

A **YEO HIAP SENG (MALAYSIA) BHD**

v.

FY SDN BHD

B COURT OF APPEAL, PUTRAJAYA
ABU SAMAH NORDIN JCA
ALIZATUL KHAIR OSMAN JCA
ANANTHAM KASINATHER JCA
[CIVIL APPEAL NO: B-02-896-2010]
C 2 NOVEMBER 2012

CONTRACT: *Breach - Agreement - Agreement to use part of building with payment of royalty - Machines sold without tenant's authority and knowledge before expiry by effluxion of time of contract - Whether land proprietor precluded from selling machines without consent and authority - Whether contract a tenancy agreement or tenancy cum manufacturing agreement - Whether reference of machines made in contract - Whether terms of contract represent intention of parties*

E The appellant, the proprietor of a piece of land ('the said land'),
and the respondent, a food manufacturer, had entered into an
agreement ('the said contract') allowing the latter to use a part of
building ('section') on the said land for the production/processing
of chicken nuggets for a period of two years. Under the said
F contract, the respondent was to pay to the appellant a charge/
royalty/tribute of RM0.30 per kilogram of chicken nuggets
manufactured in the said section with the guaranteed minimum
payment based on 30,000kg of chicken nuggets per month.
Disputes arose when the appellant sold its machines ('the said
G machines'), without the respondent's authority and knowledge to
Ayam Wira Food Processing Sdn Bhd before the expiry by
effluxion of time of the said contract. The respondent proceeded
to file an action against the appellant in the High Court for breach
of contract. The respondent contended that by virtue of cl. 1.7(a)
H of the said contract, the appellant was precluded from selling the
said machines without the consent and authority of the
respondent. In its defence, the appellant claimed that there was
no reference to the said machines in the said contract and that
the appellant could not be precluded from selling its own
I machines. The appellant further argued that the said contract was
a tenancy agreement while the respondent averred that the said
contract was a tenancy cum manufacturing agreement. The learned

High Court judge held in favour of the respondent on the basis that the respondent used its manpower and workforce to manufacture chicken using both the respondent's and appellant's machines located at the said section for a fee as royalty. Dissatisfied, the appellant appealed against the decision of the High Court.

Held (allowing appeal with costs; setting aside order of court below)

Per Anantham Kasinather JCA delivering the judgment of the court:

- (1) As regards to the respondent's pleaded case, the respondent's cause of action was based entirely on a breach of the express terms of the said contract. The learned trial judge had agreed with the respondent's submission that cll. 1.1, 1.2 and 1.7(a) if read together, imposed a contractual obligation on the appellant not to sell its machines as it would interfere with the respondent's contractual obligation under cl. 1.2 to manufacture chicken nuggets for the respondent. However, this court was unable to agree with either the reasoning or the conclusion of the trial judge. The trial judge's conclusion could only be possible if the respondent had relied on terms to be implied into the said contract to provide business efficacy. Since the respondent did not plead as such, the learned trial judge ought not to have attributed such a contractual obligation to the appellant. (para 9)
- (2) The machines belonged to the respondent and not the appellant. The contractual obligation of the respondent to manufacture the chicken nuggets could have been discharged with the use of the respondent's own machines. There was no express term in the said contract nor any basis to imply a term that the respondent's obligation under the said contract to manufacture chicken nuggets was conditional on the availability during the subsistence of the said contract of the said machines. In the absence of any reference to the said machines in the said contract, the prohibition against the sale of the said machines cannot be read into the terms of the said contract as representing the intention of the parties. (para 9)

A ***Bahasa Malaysia Translation Of Headnotes***

- Perayu, pemilik sebidang hartanah ('hartanah tersebut'), dan responden, pengeluar makanan, telah memeterai suatu perjanjian ('kontrak tersebut') yang membenarkan responden untuk menggunakan sebahagian bangunan ('bahagian') di atas hartanah tersebut untuk pengeluaran/pemprosesan nugget ayam bagi tempoh dua tahun. Di bawah kontrak tersebut, responden perlu membayar kepada perayu caj/royalti/bayaran RM0.30 bagi sekilogram nugget ayam yang dikeluarkan dalam bahagian tersebut dengan bayaran minimum yang dijamin berdasarkan 30,000kg nugget ayam sebulan. Pertikaian timbul apabila perayu menjual mesin-mesinnya ('mesin-mesin tersebut'), tanpa kebenaran dan pengetahuan responden kepada Ayam Wira Food Processing Sdn Bhd sebelum tarikh tamat kontrak tersebut. Responden seterusnya memfailkan tindakan terhadap perayu di Mahkamah Tinggi bagi kemungkiran kontrak. Responden menghujahkan bahawa menurut kl. 1.7(a) kontrak tersebut, perayu terhalang daripada menjual mesin-mesin tersebut tanpa persetujuan dan kebenaran responden. Dalam pembelaannya, perayu mendakwa bahawa tiada apa-apa dalam kontrak tersebut yang merujuk kepada mesin-mesin tersebut dan bahawa perayu tidak boleh terhalang daripada menjual mesin-mesinnya sendiri. Perayu seterusnya menghujahkan bahawa kontrak tersebut adalah perjanjian penyewaan manakala responden menegaskan bahawa kontrak tersebut adalah perjanjian penyewaan merangkap pengeluaran. Keputusan Yang Arif Hakim Mahkamah Tinggi berpihak kepada responden atas alasan bahawa responden menggunakan tenaga manusia dan tenaga kerja untuk mengeluarkan ayam menggunakan kedua-dua mesin-mesin responden dan perayu yang terletak di bahagian tersebut dengan bayaran sebagai royalti. Tidak berpuas hati, perayu merayu terhadap keputusan Mahkamah Tinggi.
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- C
- D
- E
- F
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Diputuskan (membenarkan rayuan dengan kos; mengetepikan perintah mahkamah di bawah)

H **Oleh Anantham Kasinather HMR menyampaikan penghakiman mahkamah:**

- (1) Berkenaan dengan kes responden, kausa tindakan responden adalah berdasarkan sepenuhnya kepada pelanggaran syarat-syarat nyata kontrak tersebut. Yang arif hakim bicara bersetuju dengan hujahan responden bahawa kll. 1.1, 1.2 dan 1.7 (a) jika dibaca bersama, mengenakan obligasi kontraktual kepada perayu untuk tidak menjual mesin-mesin kerana ia akan mengganggu obligasi kontraktual responden di bawah kl. 1.2
- I

untuk mengeluarkan nuget ayam. Walau bagaimanapun, Mahkamah ini tidak dapat bersetuju dengan hujah atau kesimpulan hakim bicara. Kesimpulan hakim perbicaraan hanya berkemungkinan sebegitu jika responden telah bergantung pada terma tersirat dalam kontrak tersebut untuk memberikan keberkesanan perniagaan. Oleh kerana responden tidak memplidkan sedemikian, hakim bicara tidak sepatutnya mengaitkan apa-apa obligasi kontraktual ke atas perayu.

- (2) Mesin adalah milik responden dan bukan perayu. Obligasi kontraktual responden untuk mengeluarkan nuget ayam boleh dilepaskan melalui penggunaan mesin responden sendiri. Tiada terma nyata dalam kontrak tersebut mahupun sebarang asas yang menunjukkan bahawa obligasi responden di bawah kontrak tersebut untuk mengeluarkan nuget ayam adalah tertakluk kepada ketersediaan semasa tempoh kontrak mesin-mesin tersebut. Tanpa sebarang rujukan kepada mesin-mesin tersebut dalam kontrak, larangan terhadap penjualan mesin tersebut tidak boleh dimasukkan ke dalam terma kontrak tersebut untuk menunjukkan hasrat pihak-pihak.

For the appellants - Dato' M Rajasekaran (M Vinoben with him); M/s Raja, Darryl & Loh

For the respondent - Sng En Kim (Lee Tat Yew with him); M/s Sng & Co

[Editor's note: For the High Court judgment, please see FY Sdn Bhd v. Yeo Hiap Seng (Malaysia) Bhd [2010] 1 LNS 600.]

Reported by Najib Tamby

JUDGMENT

Anantham Kasinather JCA:

Background Facts

[1] The appellant is the proprietor of land known as Lot 191, Jalan Utas, 40700 Shah Alam, Selangor ("the said land".) The respondent is a food manufacturer whose products *inter alia* included the preparation and sale of chicken nuggets, burgers and sausages.

[2] By an agreement dated 29 September 1999 entered into between the appellant and respondent (hereinafter referred to as "the said contract"), the appellant agreed to allow the respondent

- A** the use of part of the said land subject to the terms and conditions contained therein. The expressed terms of the said contract *inter alia* were that:
- B** (a) In consideration of the respondent agreeing to pay the charge/royalty/ tribute payments in accordance to cl. 1.2 below, the appellant hereby agrees to permit and allow the respondent to occupy the said section and to utilize the said Section for the production/processing of chicken nuggets for a period of two years commencing from 1 June 1999 (cl. 1.1);
- C** (b) The respondent was to pay to the appellant a charge/royalty/tribute of sen 30 (RM 0.30) per kilogram of chicken nuggets manufactured in the said Section with the guaranteed minimum payment based on thirty thousand (30,000) Kilogram of chicken nuggets per month (cl. 1.2);
- D** (c) So long as the respondent shall pay the charge/royalty/tribute on the due date and perform and observe the several agreement stipulations and covenants on his part herein contained, the respondent shall peaceably hold and enjoy the use and occupation of the said section during the term of the said contract without any interruption by the appellant or persons lawfully claiming through or under the appellant (cl. 1.7(a));
- E**
- F** (d) The word 'section' is defined in the said contract to mean 'part of a building' erected on the said land and more particularly delineated on the plan annexed to the said contract (recital 3);
- G** (e) The respondent was permitted at its own costs and expense to install its plant and machinery in the said section more particularly described in the schedule annexed as schedule 1 in the said contract (see cl. 1.4)
- H** (f) The plant and machinery described in schedule 1 was not to form part of the said section or the said land and the respondent was entitled to remove the plant and machinery (see s. 1.6 of the said contract)
- I** (g) The respondent was permitted to peaceably hold and enjoy the use and occupation of the said Section during the term of the said contract (cl. 1.7(c)); and

- (h) The respondent was permitted to remove and take away all its plant machinery and fixtures subject to rectifying any damage caused to the said section in consequence of such removal upon the expiration of the said contract (cl. 1.7(e)) **A**

[3] On or about 15 November 2000, before the expiry by effluxion of time of the said contract, the appellant, according to the respondent, without its authority and knowledge and in breach of the contract sold machines belonging to the appellant (the said machines) located in the said Section to Ayam Wira Food Processing Sdn Bhd. **B**
C

Respondent's Case

[4] The respondent's cause of action was for breach of contract. The breach as pleaded by way of particulars in the statement of claim were as follows: **D**

- (a) Without the said machines the respondent could not process chicken nuggets provided for in cl. 1.1 of the said contract;
- (b) Ayam Wira Food Processing Sdn Bhd had increased the processing fee for the chicken nuggets for the respondent and had reduced the amount of chicken nuggets processed a month. The respondent had removed the said machines from the said section at the end of January 2001; **E**
- (c) The said contract expired by effluxion of time on 31 May 2001; **F**
- (d) The respondent could not use the said section without any hindrance from the appellant or third parties which is claiming through or under the appellant which is in breach of cl. 1.7(a) of the said contract. **G**

[5] In other words, the respondent's cause of action was that by the express terms of the said contract more particularly described in cl. 1.7(a), the appellant was precluded from selling the said machines without the consent and authority of the respondent during the subsistence of the said contract. The appellants, according to the respondent, in breach of this clause sold the said machines resulting in Ayam Wira Food Processing Sdn Bhd imposing higher charges than permitted under the said contract. **H**
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A Appellant's Case

[6] The appellant's defence is twofold. The first line of defence was that the respondent's pleaded cause of action was based on the express terms of the said contract and there is no reference to the said machines in the said contract. The second line of defence was that in the absence of any reference to the said machines in the said contract, the appellant could not conceivably be precluded from selling its own machines. The appellant cannot therefore be in breach of the said contract when selling the said machines when under no contractual obligation to maintain all or any of the said machines in the section. In other words, the fact that the appellant allowed the respondent the use of the said machines located in the section did not give rise to a contractual obligation precluding it from selling the same during the subsistence of the said contract.

Issues

[7] This case revolves around the construction of the terms of the said contract dated 29 September 1999. The submission of learned counsel for the appellant was that the said contract was in essence a tenancy agreement. Learned counsel for the respondent on the other hand contended that the said contract was a tenancy cum manufacturing agreement. The basis for this submission of learned counsel for the respondent was because, according to him, cl. 1.1 of the said contract read with cl. 1.2 not only enabled the respondent to have the use and occupation of the section but also required the respondent to supply a minimum amount of chicken nuggets to the appellant. The reasoning being that these two clauses read together impliedly prohibited the appellant from selling the said machines since otherwise the respondent would not be able to fulfill its obligations under cl. 1.2 of the said contract. Hence the claim that the said contract was in essence a tenancy cum manufacturing agreement.

H Decision Of The High Court

[8] The learned judge agreed with the respondent that the appellant breached the said contract when it sold its machines to Ayam Wira Food Processing Sdn Bhd on 15 November 2000, prior the expiry of the said contract. The learned judge construed the terms of the said contract as amounting to a manufacturing

agreement between the appellant and the respondent and not a tenancy agreement as contended by the appellant. The learned judge's basis for this conclusion is to be found in p. 78 of bahagian A wherein Her Ladyship stated as follows:

From the wording of P1, the agreement seems to be a tenancy agreement where the defendant is the landlord and the plaintiff a tenant where the landlord allows the tenant to occupy and utilized the said section in its factory for the production of chicken nuggets for a period of 2 years for a royalty to be paid to the landlord at 30 cent per kilogram of chicken nuggets manufactured in the said section.

Though in the working it is a tenancy agreement, the reality is that by both the plaintiff's and defendant's conduct there exist a contract packing arrangement not disputed by both parties where the defendant using its manpower and workforce will manufacture chicken nuggets for the plaintiff using both the plaintiff's and defendant's machines located at the said section for a fee as royalty charged at 30 cent per kilogram of chicken nuggets manufactured by the defendant in the said section, thereby in essence making P1 a manufacturing agreement.

Decision Of The Court

[9] With respect, we are unable to agree with either the reasoning or the conclusion of the learned trial judge. First, as regards to the respondents' pleaded case, the cause of action was based entirely on a breach of the express terms of the said contract, more particularly cl. 1.7(a). However, the thrust of the respondent's submission was really that cls. 1.1, 1.2 and 1.7 (a) read together imposed a contractual obligation on the appellant not to sell its machines as the sale of the same would interfere with the respondent's contractual obligation under cl. 1.2 to manufacture chicken nuggets for the respondent. The learned trial judge agreed with this submission. With respect, the learned judge's conclusion to this effect is only possible if the respondent had pleaded reliance on terms to be implied into the said contract to provide business efficacy. Since there was no such plea in the respondent's statement of claim, in our opinion, the learned trial judge ought not to have attributed such a contractual obligation to the appellant. Secondly, even if the statement of claim had included such a plea thereby justifying the learned trial judge's conclusion that the said contract was in substance a manufacturing agreement, we are unable to understand how this

- A finding would make any difference to the right of the appellant to sell the said machines. We opine to this effect because the machines described in the schedule and located in the section belonged to the respondent and not the appellant. As such the contractual obligation of the respondent to manufacture chicken nuggets, consistent with terms of the said contract, could have been discharged with the use of the respondent's own machines described in sch. 1 and located in the section. There is no express term in the said contract nor any basis to imply a term that the respondent's obligation under the said contract to manufacture chicken nuggets was conditional on the availability during the subsistence of the said contract of the said machines ie, the machines belonging to the appellant. In the absence of any reference to the said machines in the said contract, the prohibition against the sale of the said machines during the subsistence of the said contract cannot, in our opinion, be read into the terms of the said contract as representing the intention of the parties. With respect, the learned trial judge failed to appreciate that if that was the intention of the parties then nothing was easier than for the parties to have included the said machines in the schedule and included a covenant precluding the appellant from dealing with the same under cl. 1.7. Clause 1.7 in its present form only imposed upon the appellant the obligation to ensure that the respondent was provided with the peaceful 'use and occupation of the said section' and the right to remove the respondent's machines upon the expiration of the said contract notwithstanding that they may be fixtures.

- [10] Accordingly, we allowed the appeal with costs. Order of High Court set aside. Costs here and below. The respondent to pay costs of RM20,000 for here and below. Deposit to respondent towards account of fixed costs.

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